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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 230.

EDWARD W. SPEED, AS ADMINISTRATOR OF WILLIAM B. FRANKLIN, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

PATRICK B. McCARTHY.

IN ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, STATE OF SOUTH DAKOTA.

FILED MARCH 26, 1900.

(17,689.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 14, 1900.

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a In the Circuit Court of the Seventh Judicial Circuit in and for Pennington County, South Dakota.

PATRICK B. McCARTHY, Plaintiff, *vs.* EDWARD W. SPEED, as Administrator of the Estate of William Franklin, Deceased, *et al.*, Defendants.	Record and Proceedings in Circuit Court of Pennington County, South Dak. Certified to Supreme Court of the United States upon a Writ of Error at the Instance of the Defendants.

1 STATE OF SOUTH DAKOTA, } ss:
County of Pennington, }

In pursuance of the command of the writ of error within, I, John P. McElroy, Jr., clerk of the circuit court in and for the county of Pennington, in the State of South Dakota, herewith transmit a copy of the record, assignment of errors, and all proceedings as hereinafter set forth in the case of Patrick B. McCarthy, plaintiff, against Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Cora C. Stone, as heir-at-law of said William B. Franklin, deceased; Georgia B. Bierman, as sole devisee and heir-at-law of Jennie E. Franklin, deceased; Alvah F. Fay, as executor of the last will of said Jennie E. Franklin, deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as executors of the last will and testament of John J. Fayel, deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, her guardian, as heirs at-law and successors in interest of said John J. Fayel, deceased, lately pending in the said circuit court in and for the county of Pennington, within the seventh judicial circuit of the State of South Dakota, under my hand and the seal of said court.

That said record and proceedings as hereby certified and transmitted consists of the following, viz: The original citation to the plaintiff, Patrick B. McCarthy, and his attorneys, with proof of service thereof; the original writ of error with proof of service upon the plaintiff, Patrick B. McCarthy, and his attorneys; the original order fixing the amount of defendants' bond in this proceeding; the original bond herein in the sum of one thousand dollars for costs for the benefit of the plaintiff, duly approved by the judge of said circuit court of Pennington county, South Dakota; the original assignment of errors herein, and the original petition for a writ of error herein, together with proof of filing each thereof.

2 Also a true, full, perfect, and complete copy of all proceedings except the evidence had herein in said circuit court of Pennington county, South Dakota, and the judgments of the supreme court of South Dakota on appeal from said circuit court as follows, to wit: Copy of the summons, complaint, amended answer, opinion of circuit court upon the trial hereof, decision of trial court in circuit court of Pennington county, South Dakota, consisting of findings of fact, conclusions of law and direction for judgment

in favor of defendants and against the plaintiff, judgment of circuit court of Pennington county, South Dakota, in favor of defendants and against the said plaintiff, Patrick B. McCarthy; plaintiff's notice of motion for a new trial, order overruling plaintiff's motion for a new trial, notice of appeal to supreme court of South Dakota, undertaking on appeal, first opinion of supreme court of South Dakota on appeal from said circuit court of Pennington county, which was filed December 21, 1898; second opinion of said supreme court, filed September 2, 1899; remittitur from supreme court of South Dakota, and judgment of said circuit court of seventh judicial circuit of South Dakota in and for Pennington county upon the mandate and direction of the supreme court of the State of South Dakota, dated January 13, 1900.

And I further certify that the same are and constitute the whole and every part of said record and proceedings, except the evidence in said cause, as the same remains of file and on record in my office, and the same are hereby transmitted and certified to the clerk of the Supreme Court of the United States, at Washington, D. C., pursuant to said writ of error.

Witness my official signature and the seal of said circuit court, at Rapid City, in said county of Pennington, this 7th day of March, in the year of our Lord one thousand and nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

[Seal Circuit Court, Pennington County, South Dakota.]

JOHN P. McELROY, JR.,
Clerk of Circuit Court in and for Pennington County, South Dakota.

[10-cent U. S. internal-revenue stamp, canceled 3, 7, 1900. J. P. McE., Jr.]

3 UNITED STATES OF AMERICA, }
District of South Dakota, } ss:

I hereby certify that the annexed and within citation came into my hands for service on the 16th day of February, A. D. 1900, and on the 16th day of February, A. D. 1900, I served the said within annexed citation on the said Patrick B. McCarthy, therein named as defendant in error, at the city of Rapid City, in the county of Pennington, in the district and State of South Dakota, by then and there delivering to and leaving with the said Patrick B. McCarthy personally a true copy of the said within and annexed citation.

And I further certify that I served the within and annexed citation on Charles W. Brown, attorney for the said defendant in error, Patrick B. McCarthy, on the 16th day of February, A. D. 1900, at the city of Rapid City, county of Pennington, in the district and State of South Dakota, by then and there delivering to and leaving with him personally a true copy of the within and annexed citation.

Dated at Deadwood, in the district of South Dakota, this 17th day of February, A. D. 1900.

EDWARD G. KENNEDY,
United States Marshall for the District of South Dakota,
By JOHN P. BELDING, *Deputy.*

Marshall Fees.

Serving citation	$8.00
Travel	8.40
Copies	1.00
	$17.40

4 UNITED STATES OF AMERICA, *ss:*

To Patrick B. McCarthy, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court in and for the county of Pennington, in the State of South Dakota, wherein Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Cora C. Stone, as heir-at-law of said William B. Franklin, deceased; Georgia B. Bierman, as sole devisee and heir-at-law of Jennie E. Franklin, deceased; Alvah F. Fay, as executor of the last will of said Jennie E. Franklin, deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as executors of the last will and testament of John J. Fayel, deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, her guardian, as heirs-at-law and successors in interest of said John J. Fayel, deceased, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 1st day of February, in the year of our Lord one thousand and nine hundred.

LEVI McGEE
Presiding Judge of the Circuit Court of South Dakota in and for Pennington County.

5 [Endorsed:] United States of America. Citation. Filed February 17, 1900. John P. McElroy, Jr., clerk of courts.

6 UNITED STATES OF AMERICA, *District of South Dakota,* } *ss:*

I hereby certify that the annexed and within writ of error came into my hands for service on the sixteenth day of February, A. D. 1900, and on the said sixteenth day of February, A. D. 1900, I served the said within annexed writ of error on the said Patrick B. McCarthy, therein named as defendant in error, at the city of Rapid City, in the county of Pennington, in the district and State of South Dakota, by then and there delivering to and leaving with the said Patrick B. McCarthy personally a true copy of said within and annexed writ of error.

And I further certify that I served the within and annexed writ

of error on Charles W. Brown, attorney for the said defendant in error, Patrick B. McCarthy, on the said sixteenth day of February, A. D. 1900, at the city of Rapid City, in the county of Pennington and in the district and State of South Dakota, by then and there delivering to and leaving with him, said Charles W. Brown, personally a true and correct copy of said writ of error.

Dated at Rapid City, in the district of South Dakota, this sixteenth day of February, A. D. 1900.

EDWARD G. KENNEDY,
United States Marshall for the District of South Dakota,
By JOHN P. BELDING, *Deputy.*

Marshall's Fe-s.

Serving writ, 2 persons	$8.00
Travel—42 miles & return	8.40
Copies	1.00
	$17.40

7 UNITED STATES OF AMERICA:

The President of the United States of America to the honorable the judge of the circuit court in and for the county of Pennington, in the State of South Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court in and for the county of Pennington, in the State of South Dakota, before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Patrick B. McCarthy, plaintiff, and Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Cora C. Stone, as heir-at-law of said William B. Franklin, deceased; Georgia B. Bierman, as sole devisee and heir-at-law of Jennie E. Franklin, deceased; Alvah F. Fay, as executor of the last will of said Jennie E. Franklin, deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as executors of the last will and testament of John J. Fayel, deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, her guardian, as heirs-at law and successors in interest of said John J. Fayel, deceased, defendants, wherein was drawn in question the construction of the statutes of the United States and the decision was against the title, right, privileges, and exemption specially set up and claimed under such statutes, and manifest error hath happened, to the great damage of the said Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Cora C. Stone, as heir at-law of said William B. Franklin, deceased; Georgia B. Bierman, as sole devisee and heir-at-law of Jennie E. Franklin, deceased; Alvah F. Fay, as executor of the last will of said Jennie E. Franklin, deceased; Thomas C. Blair, Albert Amsbury; John S. George, George

8 E. Yost, and Philip M. Ranney, as executors of the last will and testament of John J. Fayel, deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel,

her guardian, as heirs at-law and successors in interest of said John J. Fayel, deceased, as by their complaint appears, we, being willing that error, if any hath been done, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and the proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 13*rd* day of March next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the first day of February, in the year of our Lord one thousand and nine hundred.

(Seal Circuit Court of the United States, District of South Dakota, Deadwood.)

OLIVER S. PENDAR,
Clerk of the Circuit Court of the United States for the District of South Dakota,
By C. A. COE, *Deputy.*

Allowed:
LEVI McGEE,
Presiding Judge of the Circuit Court of the State of South Dakota in and for Pennington County.

9 & 10 [Endorsed:] United States of America. Writ of error. Filed Feb'y 1st, 1900. John P. McElroy, Jr., clerk of court.

11 At a term, to wit, the November, A. D. 1899, term of the circuit court of Pennington county, in the State of South Dakota, held at the court-room of the city of Rapid City, South Dakota, on the 23rd day of January, A. D. 1900.

Present: The Honorable Levi McGee, circuit judge, presiding.

PATRICK B. McCARTHY, Plaintiff,
vs.
EDWARD W. SPEED, as Administrator of William B. Franklin, Deceased; Cora C. Stone, as Heir-at-law of said William B. Franklin, Deceased; Georgia B. Bierman, as Sole Devisee and Heir-at-law of Jennie E. Franklin, Deceased; Alvah F. Fay, as Executor of the Last Will of said Jennie E. Franklin, Deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as Executors of the Last Will and Testament of John J. Fayel, Deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, Her Guardian, as Heirs-at-law and Successors in Interest of John J. Fayel, Deceased, Defendants. } Order.

Upon motion of Messrs. Fowler & Whitfield, attorneys for the defendants, and upon filing the petition for a writ of error and an assignment of errors—

It is ordered that a writ of error be, and hereby is, allowed to have reviewed by the Supreme Court of the United States the judgment heretofore entered herein, and that the amount of bond upon said writ of error be, and the same is hereby, fixed at the sum of one thousand dollars.

LEVI McGEE,
Presiding Judge of the Circuit Court of the State of South Dakota within and for Pennington County, South Dakota.

Order Book 1, page 298.

12 [Endorsed:] Circuit court, Pennington county, South Dak. Patrick B McCarthy, plaintiff, *vs.* Edward W. Speed, as administrator of the estate of William B. Franklin, deceased, *et al.*, defendants. Order fixing amount of bond and order allowing writ of error. Fowler & Whitfield, attorneys for defendants.

13 In the Supreme Court of the United States.

EDWARD W. SPEED, as Administrator of the Estate of William B. Franklin, Deceased; Cora C. Stone, as Heir at-law of said William B. Franklin, Deceased; Georgia B. Bierman, as Sole Devisee and Heir-at-law of Jennie E. Franklin, Deceased; Alvah F. Fay, as Executor of the Last Will of said Jennie E. Franklin, Deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as Executors of the Last Will and Testament of John J. Fayel, Deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, Her Guardian, as Heirs-at-law and Successors in Interest of said John J. Fayel, Deceased, Plaintiffs in Error,
against
PATRICK B. McCARTHY, Defendant in Error.

Know all men by these presents that we, James Halley and Herbert W. Somers, all of the county of Pennington and the State of

South Dakota, are held and firmly bound unto the above-named defendant in error, Patrick B. McCarthy, in the full and just sum of one thousand dollars, to be paid to the said Patrick B. McCarthy, his certain attorney, executor, administrator, or assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of — heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated 23rd day of January, in the year of our Lord one thousand and nine hundred.

14 Whereas the above-named Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Cora C. Stone, as heir-at-law of said William B. Franklin, deceased; Georgia B. Bierman, as sole devisee and heir-at-law of Jennie E. Franklin, deceased; Alvah F. Fay, as executor of the last will of said Jennie E. Franklin, deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as executors of the last will and testament of John J. Fayel, deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, her guardian, as heirs-at-law and successors in interest of said John J. Fayel, deceased, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court in and for the county of Pennington and State of South Dakota:

Now, therefore, the condition of this obligation is such that if the above Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Cora C. Stone, as heir-at-law of said William B. Franklin, deceased; Georgia B. Bierman, as sole devisee and heir-at-law of Jennie E. Franklin, deceased; Alvah F. Fay, as executor of the last will of said Jennie E. Franklin, deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as executors of the last will and testament of John J. Fayel, deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, her guardian, as heirs-at-law and successors in interest of said John J. Fayel, deceased, shall prosecute their said writ of error to effect and answer all costs if they shall fail to make their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JAMES HALLEY.
HERBERT W. SOMERS.

Sealed and delivered in presence of two witnesses:
FRED H. WHITFIELD,
J. H. GALE, *Witnesses.*

15 STATE OF SOUTH DAKOTA, } *ss:*
County of Pennington, }

James Halley and Herbert W. Somers, being duly and separately sworn, on oath doth each for himself depose and say that he is worth the sum of $2,000 over and above all his just debts, liabilities, and exemptions.

JAMES HALLEY.
HERBERT W. SOMERS.

Subscribed and sworn to before me this 23rd day of January, A. D. 1900.

[Seal of Fred. H. Whitfield, Notary Public, South Dakota.]

FRED H. WHITFIELD,
Notary Public for Pennington County, South Dakota.

Approved:

LEVI McGEE,
Presiding Judge of the Circuit Court of State of South Dakota in and for Pennington County.

Order Book 1, pages 299 & 300.

16 [Endorsed:] In the Supreme Court of the United States. —— ——, plaintiffs in error, *vs.* —— ——, defendant in error. Bond.

17 STATE OF SOUTH DAKOTA:

Circuit Court in and for Pennington County.

PATRICK B. McCARTHY, Plaintiff,
vs.
EDWARD W. SPEED, as Administrator of the Estate of William B. Franklin, Deceased; Cora C. Stone, as Heir-at-law of said William B. Franklin, Deceased; Georgia B. Bierman, as Sole Devisee and Heir-at-law of Jennie E. Franklin, Deceased; Alvah F. Fay, as Executor of the Last Will of said Jennie E. Franklin, Deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as Executors of the Last Will and Testament of John J. Fayel, Deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, Her Guardian, as Heirs-at-law and Successors in Interest of said John J. Fayel, Deceased, Defendants. } Assignment of Errors.

The defendants in this action, Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Cora C. Stone, as heir-at-law of said William B. Franklin, deceased; Georgia B. Bierman, as sole devisee and heir-at-law of Jennie E. Franklin, deceased; Alvah F. Fay, as executor of the last will of said Jennie E. Franklin, deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as executors of the last will and testament of John J. Fayel, deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, her guardian, as heirs-at-law and successors in interest of said John J. Fayel, deceased, in connection with their petition for a writ of error, make the following assignment of errors which they aver occurred upon the trial and in the decision of this cause, to wit:

First. That the said circuit court of Pennington county in
18 rendering and entering said judgment and the supreme court of the State of South Dakota in determining the said cause and directing the entry of said judgment erred in this, to wit, that although in the pleadings in said cause and upon the trial thereof in said circuit court of Pennington county and in the supreme court of the State of South Dakota it was contended by the defendants that the mining claim known as the Tin Bar No. 1 Lode claim was void under the statutes of the United States relating to mineral claims, because, as the fact is and as appears in the findings of fact herein at the time of the attempted location of the said claim known as the Tin Bar No. 1 Lode claim, the alleged discovery point on said Tin Bar No. 1 Lode claim was within the boundaries of a then subsisting valid placer mining claim known as the Reed placer mining claim, yet the said circuit court of Pennington county and the said supreme court of the State of South Dakota decided against the said contention of these defendants, and said judgment depends upon and is based on said decision.

Second. That the said circuit court of Pennington county in rendering and entering said judgment and the said supreme court of the State of South Dakota in determining said cause and directing the entry of said judgment erred in this, to wit, that although in the pleadings in said cause and upon the trial thereof in said circuit court of Pennington county and in the supreme court of the State of South Dakota it was contended by the defendants *and* upon the trial of said cause in the said circuit court of Pennington county and the said supreme court of the State of South Dakota it was found and determined that upon the facts found and determined in said cause a portion of the land embraced in the Tin Bar No. 1 Lode claim and the Tin Bar No. 2 Lode claim was at the time of
19 the attempted location of said lode claims within the limits of a prior valid placer mining claim known as the Reed placer mining claim, and it was contended by these defendants that upon the facts so as aforesaid found in said cause, under the statutes of the United States relating to mining claims, the said Tin Bar No. 1 Lode claim and Tin Bar No. 2 Lode claim were void in so far and to the extent that they embraced lands included within the said Reed placer mining claim, yet the said circuit court of Pennington county and the said supreme court of the State of South Dakota decided against the said contention of these defendants, and said judgment depends upon and is based on said decision.

Third. That the said circuit court of Pennington county in rendering and entering said judgment and the said supreme court of the State of South Dakota in determining said cause and directing the entry of said judgment erred in this, to wit, that although in the pleadings in said cause and that upon the trial thereof in said circuit court of Pennington county and in the supreme court of the State of South Dakota it appeared and was averred and so determined and appears in the findings of said fact herein that at a date prior to the time of the application for patent to the said Reed

placer mining claim, to wit, the 23rd of November, 1892, there were no known lodes or veins upon said Reed placer mining claim within the boundary lines of said Tin Bar No. 1 or Tin Bar No. 2 locations of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for either exploration or development; that no adverse — was filed by the owners of said Tin Bar No. 1 or Tin Bar No. 2 locations to the said application for patent for the said Reed placer mining claim; that in said application for patent for the said Reed placer mining claim there was no application for patent for any lode or veins included therein, and it was contended by these defendants in the
20 said circuit court of Pennington county and in the said supreme court of the State of South Dakota that under the statutes of the United States relating to mining claims, by reason of said facts and of the making of the final entry of the said Reed placer mining claim and the issuing of the patent therefor, all rights of the owners of the said Tin Bar No. 1 Lode claim and Tin Bar No. 2 Lode claim become and were barred and lost, yet the said circuit court of Pennington county and the said supreme court of the State of South Dakota decided against said contentions of these defendants, and said judgment depends upon and is based upon said decision.

Fourth. That the said circuit court of Pennington county in rendering and entering said judgment and the said supreme court of the State of South Dakota in determining said cause and directing the entry of said judgment erred in this, to wit, that although in the pleadings in said cause it was alleged and upon the trial thereof in said court of Pennington county and in the said supreme court of the State of South Dakota it appeared and was found as a fact in the cause that the persons who attempted to locate the said Tin Bar No. 1 Lode claim and the said Tin Bar No. 2 Lode claim failed and neglected to perform the work on the mining claims required by the statutes of the United States relating to mining claims, and it was contended by these defendants that under the statutes of the United States relating to mining claims, by reason of the failure of the locators of said Tin Bar No. 1 Lode claim and Tin Bar No. 2 Lode claim to perform thereon the work required by the statutes of the United States, the said Tin Bar No. 1 Lode claim and Tin Bar No. 2 Lode claim had become and were abandoned, null and of no effect, prior to the location of the Holy Terror Lode claim and prior to the location of the Keystone No. 4 Lode claim, yet the said circuit court of Pennington county and the said supreme — of the State of South
21 Dakota decided against said contention of these defendants, and that said judgment depends upon and is based upon said decision.

Fifth. That the said circuit court of Pennington county and the said supreme court of the State of South Dakota erred in holding and deciding, contrary to the contention of said defendants then and there made, that under said statutes of the United States the location of said Holy Terror Lode claim was invalid as against the grantor of the plaintiff.

Sixth. The said circuit court of Pennington county and the said supreme court of the State of South Dakota erred in holding and deciding, contrary to the contention of said defendants then and there made, that under said statutes of the United States the location of said Keystone No. 4 Lode claim was invalid as against the grantor of the plaintiff.

Seventh. That the said circuit court of Pennington county and the said supreme court of the State of South Dakota erred in holding and deciding, contrary to the contention of said defendants then and there made, that under the said statutes of the United States the said Tin Bar No. 1 Lode claim was at the time of the location of the Holy Terror Lode claim a valid and subsisting mining claim.

Eighth. That the said circuit court of Pennington county and the said supreme court of the State of South Dakota erred in holding and deciding, contrary to the contention of the said defendants then and there made, that at the time of the location of the said Keystone No. 4 Lode claim the said Tin Bar No. 2 Lode claim was under said statutes of the United States a valid and subsisting mining claim.

Ninth. That the said circuit court of Pennington county and the said supreme court of the State of South Dakota erred in holding and deciding, contrary to the contention of the said de-
22 fendants then and there made, that upon the facts found and determined in said cause the plaintiff is the owner of a $\frac{1}{8}$ interest in and to so much of the ground covered by the Holy Terror Lode mining claim as is embraced within the boundaries of the Tin Bar No. 1 Lode claim or is the owner of any interest whatever in any of the ground covered by the said Holy Terror Lode mining claim.

Tenth. That the said circuit court of Pennington county and the said supreme court of the State of South Dakota erred in holding and deciding, contrary to the contention of the said defendants then and there made, that upon the facts found and determined in said cause the said plaintiff is the owner of a $\frac{1}{8}$ interest in so much of the ground covered by the Keystone No. 4 Lode mining claim as is embraced within the boundaries of the Tin Bar No. 2 Lode mining claim or is the owner of any interest whatever in any portion of the ground covered by the said Keystone No. 4 Lode mining claim.

Eleventh. That the said circuit court of Pennington county, in rendering and entering said judgment, and the said supreme court of the State of South Dakota, in determining said cause and directing the entry of said judgment, erred in this, to wit: That although in the pleadings in said cause and upon the trial thereof in said circuit court of Pennington county and in the supreme court of the State of South Dakota it was contended by the defendants and upon the trial of said cause in said circuit court of Pennington county and said supreme court of the State of South Dakota it was found and determined in said cause that the land embraced within the exterior boundary lines of the said Holy Terror mining claim, together with all valuable mineral deposits contained therein, was, on the 28th day of June, 1894, the day of its location, open to loca-

tion, occupancy, and purchase by any citizen of the United
23 States or any person who had declared his intention to
become such citizen, and William B. Franklin, being such citizen and having made compliance in other respects with the acts of Congress with reference to the occupancy and purchase of mineral lands of the United States, became the owner thereof and the plaintiff had no interest in such location and now has no interest therein, yet the said circuit court of Pennington county and the said supreme court of the State of South Dakota decided against the said contention of these defendants, notwithstanding the facts so found and determined in said cause, and said judgment depends upon and is based upon such decision.

Twelfth. That the said circuit court of Pennington county, in rendering and entering said judgment, and the said supreme court of the State of South Dakota, in determining said cause and directing the entry of said judgment, erred in this, to wit: That although in the pleadings in said cause and upon the trial thereof in said circuit court of Pennington county and in the supreme court of the State of South Dakota it was contended by the defendants and upon the trial of said cause — circuit court of Pennington county and said supreme court of the State of South Dakota it was found and determined in said cause that the land embraced within the exterior boundary lines of the said Keystone No. 4 Lode mining claim, together with all the valuable mineral deposits contained therein, was, at the time of its location, open to occupancy, location, and purchase by any citizen of the United States or any person who had declared his intention to become such citizen, and William B. Franklin, Thomas C. Blair, and Jacob F. Reed, being such citizens and having made compliance in other respects with the acts of Congress with reference to the occupancy and purchase of mineral lands of the United States, became the owners of said mining
24 claim and the said mining claim now is and has been, since the 20th day of September, 1894, a valid and subsisting mining claim and the plaintiff had no interest or estate in said location and now has no interest therein, yet the said circuit court of Pennington county and the said supreme court of the State of South Dakota decided against the said contention of these defendants, notwithstanding the facts so found and determined in said cause, and said judgment depends upon and is based upon such decision.

Thirteenth. That the said circuit court of Pennington county and the said supreme court of the State of South Dakota erred in rendering judgment upon the facts found and determined in said cause in favor of the plaintiff and against the said defendants.

Wherefore the said Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Cora C. Stone, as heir-at-law of said William B. Franklin, deceased; Georgia B. Bierman, as sole devisee and heir-at-law of Jennie E. Franklin, deceased; Alvah F. Fay, as executor of the last will of said Jennie E. Franklin, deceased; Thomas C. Blair, Albert Amsbury, John S. George, George E. Yost, and Philip M. Ranney, as executors of the last will and

testament of John J. Fayel, deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, her guardian, as heirs-at law and successors in interest of said John J. Fayel, deceased, pray that the judgment of the said circuit court in and for Pennington county and State of South Dakota be reversed, and the said circuit court be ordered to enter a judgment in said cause dismissing the complaint of the said Patrick B. McCarthy and adjudge that the defendants are the holders and owners of the land, premises, and mining claims in question free and clear from any
25 claim of the said Patrick B. McCarthy thereto.

FOWLER & WHITFIELD,
CHARLES QUARLES,
Attorneys for Plaintiffs in Error.

26 [Endorsed:] In the circuit court in and for Pennington county, State of South Dakota. —— ——, plaintiff, *vs.* —— ——, defendants. Assignment of errors.

27 STATE OF SOUTH DAKOTA:

Circuit Court in and for Pennington County.

PATRICK B. McCARTHY, Plaintiff,
vs.
EDWARD W. SPEED, as Administrator of the Estate of William B. Franklin, Deceased; Cora C. Stone, as Heir-at-law of said William B. Franklin, Deceased; Georgia B. Bierman, as Sole Devisee and Heir-at-law of Jennie E. Franklin, Deceased; Alvah F. Fay, as Executor of the Last Will of said Jennie E. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, John S. George, George E. Yost, and Philip M. Ranney, as Executors of the Last Will and Testament of John J. Fayel, Deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, Her Guardian, as Heirs-at-law and Successors in Interest of John J. Fayel, Deceased, Defendants.

Petition.

Now comes Edward W. Speed, as administrator of the estate of William B. Franklin, deceased; Cora C Stone, as heir-at-law of said William B. Franklin, deceased; Georgia B. Bierman, as sole devisee and heir-at-law of Jennie E. Franklin, deceased; Alvah F. Fay, as executor of the last will of said Jennie E. Franklin, deceased; Thomas C. Blair, Albert Amsbury, John S. George, George E. Yost, and Philip M. Ranney, as executors of the last will and testament of John J. Fayel, deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, her guardian, as heirs-at-law and successors in interest of said John J. Fayel, deceased, defendants herein, and say:

That on the 13th day of January, A. D. 1900, this court, pursuant to and in accordance with the judgment and mandate of the
28 supreme court of said State of South Dakota, entered judgment herein in favor of the plaintiff and against these de-

fendants, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of these defendants, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore these defendants pray that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court.

FOWLER & WHITFIELD,
CHARLES QUARLES,
Attorneys for Defendants.

29 [Endorsed:] In the circuit court in and for Pennington county, State of South Dakota. —— ——, plaintiff, *vs.* —— ——, defendants. Petition. Filed January 23rd, 1900. John P. McElroy, Jr., clerk of courts. # 1226.

30 In the Circuit Court of the Seventh Judicial Circuit *Court* of the State of South Dakota in and for Pennington County.

PATRICK B. MCCARTHY, Plaintiff,
vs.
WILLIAM B. FRANKLIN, THOMAS C. BLAIR, ALBERT Almsbury, and John J. Fayel, Defendants. } Summons.

The State of South. Dakota sends greeting to the above-named defendants:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, which was filed in the office of the clerk of the above-entitled court in and for said county and State on the 12th day of April, A. D. 1895, and to serve a copy of your answer upon the subscriber at his law office, in the city of Rapid City, South Dakota, within thirty days after the service of this summons upon you, exclusive of the day of such service, and if you fail to answer said complaint within that time the plaintiff will apply to the court for the relief demanded in the complaint, besides the costs and disbursements of this action.

Dated at Rapid City, South Dakota, this 12th day of April, 1895.

CHARLES W. BROWN,
Plaintiff's Attorney.

31 In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota in and for Pennington County.

PATRICK B. McCARTHY, Plaintiff,
vs.
WILLIAM B. FRANKLIN, THOMAS C. BLAIR, ALBERT Almsbury, and John J. Fayel, Defendants. } Complaint.

The plaintiff complains and alleges:

I.

That the plaintiff and the defendants and all of their predecessors in interest in the property hereinafter described are now and were at all the times hereinafter mentioned citizens of the United States, each over the age of twenty-one years.

II.

That the plaintiff is now and for a long time hitherto has been the owner against all persons except as against the United States and entitled to the possession of the following-described real property and mining claims, situated in said Pennington county, to wit: An undivided one-fourth interest in and to that certain mining claim known as the Holy Terror Lode claim, recorded in the office of the register of deeds in and for said Pennington county, recorded in Book "16" of location certificates, on page 128 thereof, and situated in the Cross mining district, in said county, and being bounded on the east by the Keystone No. 1 Lode claim and on the west by the Keystone No. 4 Lode claim and on the south by the Reed placer claim, the same being a patented claim and known as M. C. No. 903, and said Holy Terror Lode claim being about five hundred feet east of U. S. L. M. No. 29 and extending along the vein of said Holy Terror lode five hundred feet southeasterly from the
32 discovery shaft and notice and one thousand feet northwesterly from said discovery shaft and notice and one hundred and fifty feet on each side of the middle of the vein.

Also an undivided one-fourth interest in and to those certain mining claims situated in Cross mining district, in said Pennington county, and known as the Keystone No. 3 Lode claim and Keystone No. 4 Lode claims, being and situated on the west side of Battle creek, in said county, and recorded in the office of the register of deeds of said Pennington county, in Book "17" of Location Certificates, on pages 638 and 639 thereof, said Keystone No. 3 lode being bounded on the east by the Keystone No. 1 lode and on the south by the Reed placer claim, a patented claim being known as M. C. No. 903, and on th- west by Keystone No. 4 Lode claim, a fractional lode claim, and said Keystone No. 4 Lode claim being bounded on the east by the Keystone No. 3 lode, with which it is parallel, and on the south by the Reed placer claim, a patented claim known as M. C. No. 903, and said Keystone No. 4 Lode claim extending along the vein thereof thirteen hundred and fifty feet northwesterly from the center of the discovery shaft and notice, and one hundred and

fifty feet southeasterly from said discovery shaft and notice, and one hundred and fifty feet on each side of the middle of the vein, said Holy Terror Lode claim and said Keystone No. 3 Lode claim and said Keystone No. 4 Lode claims being formerly located and known as the Tin Bar No. 1 Lode claim and the Tin Bar No. 2 Lode claim, recorded in the office of the register of deeds of said Pennington county, in Book "J" of Location Certificates, on pages 28 and 29 thereof.

III.

That the defendants and each of them claim an estate and interest in and to the said undivided one-fourth interest in and to the said Holy Terror Lode claim, and the said Keystone No. 3 Lode claim, and the said Keystone No. 4 Lode claim adverse to the plaintiff.

33

IV.

At the said claim of the said defendants and each of them is without any right whatever, and that the defendants or either of them have not any estate, right, title, or interest whatsoever in or to the said undivided one-fourth interest of this plaintiff in said lode claims.

Wherefore the plaintiff prays that the defendants be required to set forth the nature of their respective claims, and that all adverse claims of the defendants may be determined by decree of this court; that by said decree it be declared and adjudged that the defendants have no estate or interest whatsoever in or to the plaintiff's said undivided one-fourth interest and estate in said lode claims, and that the said title of the plaintiff is good and valid; that the defendants, each of them, be forever enjoined and debarred from asserting any claim whatsoever in or to the plaintiff's said undivided one-fourth interest and estate in said premises adverse to the plaintiff, and for such other or further relief as may be just and equitable, and for the costs and disbursements of this action.

CHARLES W. BROWN,
Plaintiff's Attorney.

STATE OF SOUTH DAKOTA, } ss:
Pennington County, }

Patrick B. McCarthy, being first duly sworn, says that he is the plaintiff in the action entitled in the foregoing complaint; that he has read said complaint and understands the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

PATRICK B. McCARTHY.

Subscribed and sworn to before me this 11th day of April, 1895.

[SEAL.] JAMES R. SHARP,
Notary Public.

34 In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota in and for Pennington County.

PATRICK B. McCARTHY, Plaintiff, *vs.* EDWARD W. SPEED, as Administrator of the Estate of William B. Franklin, Deceased; Jennie E. Franklin and Cora C. Stone, as Heirs-at-law of said William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, Defendants.	Amended Answer.

Now come the defendants, by leave of court first had and obtained, and made and serve their amended answer to the plaintiff's complaint in this action, and for such amended answer say and allege:

First. For a first defense:

I. That they admit that the defendants Thomas C. Blair, Albert Amsbury, and John J. Fayel are now and were at all the times mentioned in the complaint citizens of the United States, over the age of twenty-one years, and that William B. Franklin was a citizen of the United States, over the age of twenty-one years, at and prior to the time of his death, and that the defendants herein have and claim an interest and estate in and to the Holy Terror Lode claim. They also admit that they have and claim an interest or estate in and to the Keystone No. 4 Lode claim, as relocated and amended on the 17th day of August, 1894, and as the said claim is now staked upon the ground in accordance with said amended location.

II. They specifically deny each and every allegation and averment in said complaint not hereinbefore specifically admitted.

Second. For a second defense:

I. That Emma O'Keefe, residing at Keystone, South Da-
35 kota, and Alice Shoemaker, residing in Garfield county, Nebraska, are tenants in common with the above-named defendants of the mining claims and real property in controversy in this action, and that these defendants and the said Emma O'Keefe and Alice Shoemaker and the Holy Terror Mining Company *at* the sole and exclusive owners of the said mining property and the whole thereof, and that the said Emma O'Keefe and Alice Shoemaker are necessary parties to this action.

Third. For a third defense:

1. These defendants allege upon information and belief that the plaintiff expects and intends to establish his allegations of ownership or estate in and to the said Holy Terror Lode claim set forth in his complaint by proving or attempting to prove upon the trial of this case that the land now covered by the said Holy Terror Lode claims or some portion thereof was formerly located on the 25th day of January, 1888, under and by the name of the Tin Bar No. 1 Lode claim by Jacob F. Reed, William Franklin, Thomas C. Blair, and Frank Eaton, and by proving or attempting to prove that the plaintiff thereafter acquired some interest or estate in and to the said Tin Bar No. 1 location and thereby became a tenant in com-

mon of said claim with the other locators thereof, and by proving or attempting to prove that the said Tin Bar No. 1 location was at all times thereafter a valid and subsisting mining location and was a valid and subsisting mining location at the time of the location of the said Holy Terror Lode claim, to the extent at least that the plaintiff is vested with some interest or estate in and to said subsequent location.

2. These defendants allege that if the said Tin Bar No. 1 Lode claim was a valid and subsisting lode claim in its inception, which the defendants deny, that no assessment or development work was ever done by the locators and owners thereof or any one for them during any years subsequent to the said pretended location
36 in the year 1888, and that the said pretended Tin Bar No. 1 Lode claim and the whole thereof was forfeited and abandoned at and prior to the location of the said Holy Terror Lode claim on the 28th day of June, 1894, as hereinafter alleged.

3. That the said locators and owners of the said pretended Tin Bar No. 1 Lode claim failed to do the assessment or development work thereon required by law for the years 1889, 1890, 1891, and 1892 and 1893 and abandoned the same, and thereafter the defendant William Franklin peaceably entered upon the said ground and duly made a discovery thereon of mineral-bearing rock in place carrying gold and other valuable minerals; and on or about the 28th day of June, 1894, by the name of William B. Franklin, he duly located and appropriated the same under and by the name of the Holy Terror Lode claim, and thereafter marked the surface boundaries of the same upon the ground with eight substantial stakes, as required by law, and duly recorded the location certificate thereof in the office of the register of deeds in and for Pennington county, South Dakota, and did and performed all the said acts of location within sixty days after the date of his said discovery and within the time required by law; that the other defendants herein have since acquired an interest in and to the said Holy Terror location by purchase from the said William Franklin.

Fourth. For a fourth defense:

1. These defendants allege upon information and belief that the plaintiff expects and intends to establish his allegations of ownership and estate in and to the said Keystone No. 4 Lode claim set forth in his complaint by proving or attempting to prove upon a trial of this case that the land now covered by the said Keystone No. 4 Lode claim or some portion thereof was formerly located, on or about the 25th day of January, 1888, under and by the name of the Tin Bar No. 2 Lode claim, by Thomas C. Blair and Frank Eaton, and by proving or attempting to prove that the plain-
37 tiff thereafter acquired some interest or estate in or to said Tin Bar No. 2 Lode claim, and thereby became a tenant in common of said claim with the other locators thereof, and by proving or attempting to prove that said Tin Bar No. 2 location was at all times thereafter a valid and subsisting mining location, and was a valid and subsisting mining location at the time of the location of the said Keystone No. 4 location, to the extent at least that the

plaintiff is vested in some interest or estate in or to said Keystone No. 4 Lode claim.

2. These defendants alledge that if the said Tin Bar No. 2 Lode claim was a valid and subsisting location in its inception, which the defendants deny, that no assessment or development work was done thereon by the locators or owners *thereon* or by any one for them during any years subsequent to its pretended location, and that the said pretended Tin Bar No. 2 Lode claim and the whole thereof was forfeited and abandoned at and prior to the location of the said Keystone No. 4 Lode claim, on the 13th day of March, 1892, and hereinafter alleged.

3. That the said locators and owners of the said pretended Tin Bar No. 2 Lode claim failed to do the required assessment or development work, as required by law, for the years 1889, 1890, and 1891 and abandoned the same, and thereafter the defendants William Franklin, Thomas C. Blair, and one Jacob F. Reed peaceably entered upon said ground, and on the 13th day of March, 1892, duly made a discovery thereon of mineral-bearing rock in place carrying gold and other valuable minerals, and then and there duly located and appropriated the same under and by the name of the Keystone No. 4 Lode claim, and that they marked the surface boundaries of the same upon the ground with eight substantial stakes, as required by law, and duly recorded a location certificate thereof in the office of the register of deeds in and for Pennington county, South Dakota, and did and performed all the acts of location within sixty days after their said discovery and within the time prescribed by
38 law; that the other defendants herein have since acquired an interest or estate in and to said Keystone No. 4 location by purchase from the other locators thereof.

Wherefore these defendants demand judgment that the complaint may be dismissed upon its merits and for the costs of this action, and for general relief.

JAMES W. FOWLER AND
TEMPLE AND GARDNER,
Attorneys for Defendants.

STATE OF SOUTH DAKOTA, } ss:
County of Pennington, }

John J. Fayel, of lawful age, being first duly sworn, deposes and says that he is one of the above-named defendants; that he has read the above and foregoing amended answer and understands the contents thereof, and that the same is true of his own personal knowledge except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

JOHN J. FAYEL.

Subscribed and sworn to before me this 17th day of December, 1895.

[SEAL.] ——— ———,
Notary Public.

39 In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota in and for Pennington County.

PATRICK B. McCARTHY, Plaintiff,
vs.
WILLIAM B. FRANKLIN, THOMAS C. BLAIR, ALBERT AMSBURY, and John J. Fayel, Defendants.

In this case the plaintiff, who heretofore became the owner by purchase of an undivided eighth interest in the Tin Bar No. 1 and Tin Bar No. 2 mining claims, seeks to recover an undivided one-eighth interest in the Holy Terror and Keystone No. 4 claims.

It appears that on September 16, 1882, Jacob F. Reed and William B. Franklin located the Reed placer in conformity to the laws of the United States. The validity of that location is not called in question. Application for patent of the Reed placer was made on November 23, 1892, and final entry on March 13, 1893. In the application for patent no mention was made of any lodes or veins included within the placer.

On January 25, 1888, Jacob F. Reed, William B. Franklin, and others went upon the Reed placer and made an alleged discovery of a lode of tin bearing rock in place, and if the discovery was valid performed all the necessary acts of location. This claim was christened the Tin Bar No. 1. At the same time similar acts of location were performed by the same parties upon the Tin Bar No. 2, except that the alleged discovery upon the latter claim was beyond the limits of the Reed placer. I do not deem it necessary to determine the disputed question whether or not tin bearing rock in place was found upon either of these claims. Assessment-work of only nominal value was in any year performed in any year upon the Tin Bar claims.

40 In March 13, 1892, William B. Franklin, Jacob F. Reed, and Thomas C. Blair located the Keystone No. 4 claim, beyond the limits of the Reed placer, but including a portion of the Tin Bar No. 2. On June 28th, 1894, Franklin located the Holy Terror claim, likewise beyond the boundaries of the Reed placer, but including a portion of the Tin Bar No. 1. In 1888, shortly after the location of the Tin Bar No. 1 and 2, the plaintiff purchased an undivided one-eighth interest in the claims. He insists that although less than one hundred dollars' worth of *alluan* assessment-work was done upon each of the Tin Bar claims, and though they were confessedly open to relocation by a stranger, yet Reed and Franklin, being joint tenants with him in the old location, could not relocate the ground as forfeited and leave him out, but that, if they did so relocate it, they must hold the new claims as trustees for him to the extent of his interest in the old claims.

This raises two questions of great practical importance to the miner and by no means free from doubt to the lawyer: 1st, Can a lode claim be located over a placer between the date of the placer location and the application for patent? and, 2nd, Can one or more of the cotenants of an unpatented claim which has been forfeited

by non-performance of the annual assessment work relocate the claim for his own sole benefit, there being no proof of fraud?

Upon the first question my judgment is that the location of a placer claim completely segregates the area within it from the public domain, and thereafter, until some act or omission occurs which strips the placer claimant of his exclusive right, the claim and all that is in it is private property. If it contains a lode which is unknown, his placer patent carries it; if it contains a lode which is known, he has a right to a patent to it, provided he comply with the law in making his application and pay the purchase price. No new acts of location of the lode are required. Clearly the placer claimant has until he makes application for patent to elect
41 whether he will demand patent for the included lode, and his rights to lode and placer seem of equal dignity and of one origin until by failure to claim patent for a known lode within his ground the placer claimant renounces all right to such lode his right to the placer and all lodes within it is good as against all the world, the United States excepted. After failure to include a known lode within the application for a patent he is presumed to have abandoned it, and it is open to location, the burden being upon the new locator to establish the fact that the lode was known.

Upon the second question my judgment is that during the life of a mining claim the cotenants occupy a trust relation to each other. While the joint estate continues equity will not permit one tenant to undermine or destroy the title of his co-owners, and any new title acquired by him to the joint estate is conclusively presumed to be for the benefit of all. However, when forfeiture occurs joint tenancy and all tenancy ends, for the estate itself has perished. Having ceased to exist, no trust relation can be said to bind it. It has no quality in limitations, because it has no existence. It is not a trust estate or any estate, but reverts to the United States and resumes its old character of public domain, with all the characteristics and attributes thereof. If the claim were alive and it were desired to deprive one of the cotenants therein for failure to bear his equitable portion of the burden of maintaining the claim, clear*ing* this can be done only in the manner provided by the statute; but in case of forfeiture all the cotenants loose their estate, which reverts to the grantor. I know of no principle of equity or rule of law which forbids a part of such cotenants from taking a new and original grant of the tract included within the old claim. To hold otherwise will impress upon every foot of the unoccupied mineral lands a trust character the moment two or more prospectors post a notice or drive a stake upon it, and such trust character will follow these claims for an apparently indefinite period, leading to
42 endless embarrassment and confusion to a class of rights already sufficiently uncertain.

For all the reasons above recited the judgment of the court is for the defendants upon all the issues.

Dated January 22, 1896.

WILLIAM GARDNER, *Judge.*

43 In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for Pennington County.

PATRICK B. McCARTHY, Plaintiff,
vs.
EDWARD W. SPEED, as Administrator of the Estate of William Franklin, Deceased; Jennie E. Franklin and Cora C. Stone, as Heirs-at-law of said William Franklin, Deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, Defendants. } Decision.

This action coming on regularly for trial at the adjourned November, 1895, term of said court, and being tried to the said court without a jury on the 17th day of January, A. D. 1896, the same being a day of the said adjourned term of court, the plaintiff appearing in person and by his attorneys, Messrs. William McLaughlin and Charles W. Brown and William H. Mitchell, and the defendants appearing by their attorneys, James W. Fowler, Esq., and Messrs Temple and Gardner, and the court having heard the evidence adduced and the argument of counsel and being fully advised in the premises and having announced his decision in favor of the defendants and against the plaintiff upon all the issues, now makes and files the following findings of fact and conclusions of law:

Findings of Fact.

1st. There is no proof that the plaintiff is a citizen of the United States of America, or that he was such citizen at any of the times mentioned in the complaint, or that he had declared his intention to become such.

2nd. That on the 16th day of September, 1882, a portion of the ground in controversy was located as the Reed placer mining claim by Jacob F. Reed and William Franklin, who were then and
44 there citizens of the United States over the age of twenty-one years; that said locators duly made a discovery of placer deposits of gold within the lines of said placer claim and posted a notice of location thereon and duly marked all the corners and boundaries of said placer location, as required by law, and within sixty days thereafter they filed for record in the office of the register of deeds in and for said Pennington county a location certificate for said Reed placer claim, as required by law; that all and singular the said act of location pertaining to the said Reed placer claim *were* done in the manner and form required by law; that from the date of the location of the said Reed placer claim until the year 1892 the said Jacob F. Reed and William Franklin were in the actual, notorious, and peaceable possession of said placer claim and were the acknowledged and reputed owners thereof, and during all of said years, and particularly during the year 1887, the said Jacob F. Reed and William Franklin did or caused to be done upon said placer location one hundred dollars' worth of development-work for each of said years.

3rd. By stipulation of counsel in open court, duly entered upon the minutes, it is admitted that an application was made for a patent to the Reed placer claim by the owners of the said claim on the 23rd day of November, 1892, and that final entry of same was made in the United States land office at Rapid City, South Dakota, on the 13th day of March, 1893, and that there was no application for a lode on the present cite aside from the placer patent, and the court so finds the facts in accordance with said stipulation.

4th. That the boundaries of the said Reed placer claim as patented and as shown by the plat introduced in evidence by the defendants and marked as their Ex. 2 coincides with the boundaries of the said placer claim as staked upon the ground at the time of its original location.

5th. That on the 25th day of January, 1888, Jacob F.
45 Reed, William Franklin, Thomas C. Blair, and Frank Eaton marked the boundaries of the Tin Bar No. 1 location upon the ground with stakes, as required by law, and posted a discovery or location notice thereon, and within sixty days thereafter recorded the location certificate for said Tin Bar No. 1 *location certificate* in the office of the register of deeds in and for said Pennington county, but did no other act or acts of location at the time.

6th. That the location or discovery notice of said Tin Bar No. 1 Lode claim was posted inside the boundary line of the said Reed placer claim, to wit, said notice was posted within the exterior boundary lines of said Reed placer mining claim and between one hundred — fifty and two hundred feet easterly of the nor[illegible]esterly boundary line of the said Reed placer mining claim, and t[illegible]oint claimed as discovery on the Tin Bar No. 1 claim is the same point at which the notice was posted.

7th. That the only reference to any natural objects or permanent monument in the description of the Tin Bar No. 1 location contained in the location certificate therefor is in the words and figures as follows, to wit: "Said discovery shaft being situated upon said lode within the lines of said claim in Cross mining district, county of Pennington, Territory of Dakota, and lays four hundred — to the east of the U. S. location No. 29 monument, and crosses Battle creek on the southeast end, is fully staked and marked in accordance with the United States mining laws."

8th. That no labor has been performed upon or improvement made upon said Tin Bar No. 1 location, except about four days' work in 1889 and about four days' work in 1891, such work being of the value of not exceeding $14.00 in each of said years 1889 and 1891.

9th. That there was no agreement on the part of the defendants Thomas C. Blair and William Franklin or either of them with the plaintiff to perform any labor or to make any improvement on said Tin Bar No. 1 location from the year 1893 or 1894, and no contractual relations existed between said parties in regard to
46 said Tin Bar No. 1 location at the time of the location of the Holy Terror Lode claim on the 28th day of June, 1894.

10th. That on the 25th day of January, 1888, Thomas C. Blair and Frank Eaton marked the boundaries of the Tin Bar No. 2 loca-

tion upon the ground with eight substantial posts or stakes, and posted a location notice upon the said claim, and within sixty days thereafter rec*l*reded a location certificate for the same in the office of the register of deeds in and for said Pennington county, but that they did no other act or acts of location at the time.

11th. That no labor has been performed upon or improvements made upon the said Tin Bar No. 2 location, except about four days' labor performed thereon in 1891, of the value of not to exceed the sum of fourteen dollars.

12th. That there was no agreement on the part of the defendants William Franklin and Thomas C. Blair or either of them with the plaintiff to perform any labor or to make any improvements upon said Tin Bar No. 2 location for and during the years 1892, 1893, or 1894, and that there was no contractual relations between said parties with reference to said location during said years.

13th. By stipulation of counsel in open court and duly entered upon the minutes it is admitted that the Holy Terror location was properly made and was a valid location at the date of its location by the defendant William Franklin on the 28th day of June, 1894, and that the Keystone No. 4 location, from the date of the amended location certificate, to wit, the 20th day of September, 1894, was properly made and a valid location of the ground described in the amended location certificate thereof, and that the laws of this State and of the United States have been complied with so far as it relates to the said Holy Terror and Keystone No. 4 locations from the date of the location of the said Holy Terror mine and the date of the amended location of the said Keystone No. 4 Lode claims to the present time, and the court finds the facts in accordance with the stipulation.

47 14th. By stipulation of counsel in open court and duly entered in the minutes it is admitted that the defendants named in the summons and complaint were the owners of the Holy Terror and Keystone No. 4 location, save for the rights of the plaintiff in this action, and the court so finds the facts in accordance with the stipu-ation.

15th. That no adverse was filed by the plaintiff or other owners of the Tin Bar No. 1 and Tin Bar No. 2 location to the said application for patent to the said Reed placer *placer* claim.

16th. That at and prior to the time of the application for patent for said Reed placer claim, to wit, the 23rd day of November, 1892, there were no lodes or veins upon said Reed placer claim within the boundar*ies* lines of said Tin*e* Bar No. 1 and Tin Bar No. 2 location of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for either exploitation or development.

17th. That in said application for patent to the said Reed placer claim there was no application for patent for any lodes or veins included therein.

18th. That the southeast end of the said Holy Terror Lode claim embraces a portion of the ground claimed by the plaintiff to have been formerly covered by the northwest end of the Tin Bar No. 1,

the area in conflict amounting to 1.62 acres and described as follows, to wit: Commencing at the southeast corner of the Holy Terror Lode mining claim and running thence N. 62° 12′ W. 394.6 feet; thence S. 28° 00′ W. 7 feet; thence S. 41° 05′ W. 102.1 feet; thence S. 47° 57′ E. 480 feet to the southwest corner of Holy Terror Lode mining claim; thence N. 15° 30′ E. 222.7 feet to the place of beginning.

19th. That the southeast end of the Keystone No. 4 location embraces a portion of the ground formerly embraced by the Tin Bar No. 2 location, the area in conflict amounting to 2.71 acres, and described as follows, to wit: Commencing at the southeast corner of the Keystone No. 4 Lode mining claim and running thence N. 47° 57′ W. 480 feet; thence S. 38° 06′ W. 119 feet; thence
48 S. 39° 36′ W. 92 feet; thence S. 41° 50′ E. 135.1 feet; thence S. 47° 57′ E. 446.3 feet to the southwest corner of the Keystone No. 4 Lode mining claim; thence N. 15° 30′ E. 252.6 feet to the place of beginning.

20th. That the plat introduced in evidence by the defendants marked Exhibit "2" correctly shows the position occupied on the earth's surface by the said Reed placer, Tin Bar No. 1, Tin Bar No. 2, Holy Terror, and Keystone No. 4 locations, and their relative locations to each other, and correctly shows the boundary lines of said several locations, together with the location of the stakes, notices, discovery shafts, and workings on said claims, and correctly shows the area and extent of conflict of said location with each other.

21st. That during the year 1888 Frank Eaton conveyed by deed in due form to one George W. Williams, who was a citizen of the United States, an undivided one-fourth interest of the Tin Bar No. 1 and Tin Bar No. 2 claims and other property, and during the same year said Williams executed and delivered to the plaintiff and one Michael McGuire a mining deed in due form to the said property, to wit, an undivided one-fourth interest to the Tin Bar 1 and Tin Bar 2 and other mining property not in controversy in this case, and that on April 22, 1890, said Frank Eaton conveyed to said defendant, Franklin, an undivided one-fourth interest in and to said Tin Bar 2 claim, and said Blair conveyed an undivided one-fourth interest therein to Jacob F. Reed.

22nd. That before the commencement of this action the defendants Fayel and Amsbury became the owners in said Holy Terror and said Keystone No. 4 mining claim-, and at the beginning of said action said Franklin, Blair, Fayel, and Amsbury each owned an undivided one-quarter interest in said Holy Terror Lode mining claim and an undivided seven-thirty-sixths interest in said Keystone No. 4 Lode mining claim; that said Blair acquired his interest in said Holy Terror lode with full knowledge of whatever rights the plaintiff McCarthy had, if any.

23rd. That said Blair and Franklin during the year 1891
49 discovered a well-defined ledge of mineral-bearing rock in place carrying gold upon the said Tin Bar No. 2 claim, which

said point of discovery was outside of the limits of the said Reed placer mining claim.

24th. That the location notice upon the said Tin Bar No. 1 claim was posted upon a well-defined ledge of rock in place carrying tin, but that the said plaintiff and defendants had no knowledge of the existence of tin or other valuable deposits therein until after this action was commenced, to wit, until during the trial of this case.

Conclusions of Law.

From the facts found and admitted, the court makes and files the following conclusions of law:

First.

That the land embraced within the exterior boundary lines of the Holy Terror mining claim, together with all valuable mineral deposits contained therein, was, on the 28th day of June, 1894, the date of its location, open to location, occupancy, and purchase by any citizen of the United States or any person who had declared his intention to become such citizen, and William B. Franklin, being such citizen and having made compliance in other respects with the acts of Congress with reference to the occupancy and purchase of the mineral land of the United States, became the owner thereof, and the plaintiff had no interest in such location and now has no interest therein.

Second.

That the land embraced within the exterior boundary lines of the Keystone No. 4 lode or mining claim, together with all valuable mineral deposits contained therein, was at the time of its location open to occupancy, location, and purchase by any citizen of the United States or any person who had declared his intention to become such citizen, and William Franklin, Thomas C. Blair, and Jacob F. Reed, being such citizens and having made compliance in other respects with the acts of Congress with reference to
50 the occupancy and purchase of the mineral lands of the United States, became the owners of said mining claim, and the said mining claim now is, and has been since the 20th day of September, 1894, a valid and subsisting mining claim, and the plaintiff had no interest or estate in said location and now has no interest therein.

Third.

It is only the unoccupied and unappropriated mineral lands of the United States that are open to exploration, occupancy, and purchase. The point of discovery of the Tin Bar No. 1 claim being within the exterior boundary lines of the Reed placer mining claim, the same being a valid and subsisting mining claim at the time of the attempted location of the said Tin Bar No. 1 claim, no valid discovery could be made within the lines of said placer mining claim. The acts of location of said Tin Bar No. 1 claim were as if they had not been performed, and the same never became a mining

claim within the meaning of the acts of Congress with reference to mining locations upon the public lands.

Fourth.

That the plaintiff should take nothing by this action, and that the defendants are entitled to recover of the plaintiffs their costs and disbursements herein.

Let judgment be entered accordingly.

Dated at Rapid City, So. Dakota, this 15th day of February, A. D. 1896.

By the court:

WILLIAM GARDNER, *Judge.*

51 In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for Pennington County.

PATRICK B. MCCARTHY, Plaintiff,
vs.
EDWARD W. SWEED, as Administrator of the Estate of William Franklin, Deceased; Jennie E. Franklin and Cora C. Stone, as Heirs-at-law of said William Franklin, Deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, Defendants. } Judgment.

This cause having been brought on for trial upon the issues raised by the plaintiff's complaint and the amended answer of the defendants thereto on the 17th day of January, 1896, being a day of the regular November, 1895, term of court, the plaintiff being represented by Messrs. William L. McLaughlin, Charles W. Brown, and William H. Mitchell, his attorneys, and defendants being represented by James W. Fowler, Esq., and Messrs. Temple & Gardner, their attorneys, and this cause having been tried by the court without a jury, and findings of fact and conclusions of law and a decision thereon, in writing, having been duly rendered by the court, which are now filed in this case, wherein judgment was ordered in favor of the defendants, Edward W. Speed, as administrator of the estate of William Franklin, deceased; Jennie E. Franklin and Cora C. Stone, as heirs-at-law of said William Franklin, deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, and against the plaintiff and for costs:

Now, on motion of James W. Fowler, Esq., and Messrs. Temple & Gardner, attorneys for the defendants, it is ordered, adjudged, and decreed that the said defendants and each of them have, and they are hereby, granted judgment as prayed for in their amended answer to the plaintiff's complaint herein, and that all adverse claim or claims of the plaintiff and of all persons claiming or to
52 claim the said premises described in the complaint herein or any part thereof through or under the said plaintiff are hereby adjudged and decreed to be invalid and groundless, and that the said defendants be, and they hereby are, declared and adjudged to

be the true and lawful owners of the said mining claims described in the plaintiff's complaint herein and hereinafter described and of each and every part and parcel thereof, and that their title thereto is adjudged to be quieted against all claims, demands, or pretensions of the plaintiff, who is hereby perpetually estopped from setting up any claim or claims thereto or to any part thereof, and the title of the said defendants is subject only to such conveyances as may have been made since the commencement of this action by the defendants William B. Franklin, Thomas C. Blair, Albert Amsbury, and John J. Fayel.

*Sia*d mining claims are described as follows, to wit: That certain mining claim known as the Holy Terror Lode claim, recorded in the office of the register of deeds of said Pennington county, in Book "16" of Location Certificates, on page 128 thereof, and situated in Cross mining district, in said county, and being bounded on the east by the Keystone No. 1 Lode claim, and on the west by the Keystone No. 4 Lode claim, and on the south by the Reed placer claim, the same being a patented claim, being known as M. C. No. 903, and said Holy Terror Lode claim being about five hundred feet east of U. S. L. M. No. 29, and extending along the vein of said Holy Terror lode five hundred feet southeasterly from the center of the discovery shaft and notice, and one thousand feet northwesterly from said discovery shaft and notice, and one hundred and fifty feet on each side of the middle of the vein; also that certain mining claim situate in Cross mining district, in said Pennington county, and known as the Keystone No. 4 Lode mining claim, being and situate on the west side of Battle creek, in said county, and recorded in the office of the register of deeds of said Pennington county, in Book "17"
53 of Location Certificates, on page 639 thereof, and being bounded on the east by the Keystone No. 3 lode, with which it is parallel, and on the south by the Reed placer claim, a patented claim known as M. C. No. 903, and extending along the vein thirteen hundred and fifty feet northwesterly from the center of the discovery shaft and notice, and one hundred — fifty feet southeasterly from said discovery shaft and notice, and one hundred and fifty feet on each side of the middle of the vein.

It is further ordered, adjudged, and decreed that the plaintiff's complaint herein be, and the same is hereby, dismissed upon its merits, and that the defendants do have and recover of and from the plaintiff their costs and disbursements in this action in the sum of eighty and $\frac{85}{100}$ ($80.85) dollars, to be taxed by the clerk of this court and inserted herein, and that execution issue therefor.

Done at Rapid City, South Dakota, this 27th day of February, 1896, and the clerk of this court is directed to enter this judgment.

By the court:

WILLIAM GARDNER, *Judge.*

Which judgment was duly filed for record in the office of the clerk of said court on February 27, 1896, and recorded at length on that day in Book 7 of Judgments, page 314.

54 In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for Pennington County.

PATRICK B. McCARTHY, Plaintiff,
vs.
EDWARD W. SPEED, as Administrator of the Estate of William Franklin, Deceased; Jennie E. Franklin and Cora C. Stone, as Heirs-at-law of said William Franklin, Deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, Defendants.

Notice of Motion for a New Trial.

Please take notice that the plaintiff above named will move the court above named for a new trial of the above entitled action at the court-house, in the city of Rapid, South Dakota, on the 30th day of September, 1896, at ten o'clock a. m., or so soon thereafter as counsel can be heard, and that said motion will be based upon the following grounds:

(1.) The court erred in overruling the objection of the defendants to the following question asked of the witness James Jacoby: "Q. And what, if anything, does it contain in remunerative or paying quantities of precious metals?" And also to all the testimony offered to that question throughout the record which tended to show that the Tin Bar No. 1 location was an invalid location, either because no discovery of rock in place was made thereon or because of failure to do the assessment-work thereon, for the reason that the defendants were estopped by their acts and conduct from asserting in this action that there was no valid discovery on the Tin Bar No 1 lode or that the same was an invalid lode for any reason.

(2.) The court erred in making the 21st finding of fact so far as the court says, "But that the said plaintiff and the defendants had no knowledge of the existence of tin or other valuable deposits therein until after this action was commenced, to wit, until during the trial of this case," for the reason that the evidence to justify that portion of said finding is wholly insufficient in this:

55 It is shown by the undisputed evidence of William Challis that in 1891 there was tin on the side of the dyke sticking out, and that the character of the dyke upon which the discovery was made was tin rock, and that in 1891 the defendant William Franklin claimed that it was a good tin mine to said Challis, and that he wanted said Challis to sell it to the Harney Peak Tin Company as a tin mine.

The evidence of the defendant Thomas Blair shows that the defendants located the Tin Bar group of claims in order to make a sale of them through Frank Eaton and try to sell them as tin claims, and the names given to them shows they were located as tin claims.

The evidence of Thomas Tracy shows that long prior to the time of trial he had a conversation with William B. Franklin in which he stated that the mica dyke upon which the discovery of Tin Bar No. 1 was made was tin rock.

The evidence of Ernest Schleuning shows that he had two conversations with Blair and Franklin in which they said there was a showing of tin on the Tin Bar group, and that he thought he could dispose of the ground to the tin company; that it was showing up in tin. That was in 1890. All of this evidence is undisputed.

It is also undisputed that the defendants made these locations and filed location certificates, especially for Tin Bar No. 1, which location certificate recites that the defendants claimed the Tin Bar No. 1 by right of discovery and location; it is also undisputed that William B. Franklin, in the case of Micaeh McGuire *et al.*, plaintiffs, *vs.* William Franklin and Jennie E. Frankin, defendants, in an action in the circuit court of the seventh judicial circuit of the State of South Dakota within and for the county of Pennington, alleged that they did the annual assessment-work for the plaintiffs Patrick B. McCarthy on the Tin Bar No. 1 mining claim for the years 1889, 1890, and 1891; and in an action in which William Franklin was plaintiff — Patrick B. McCarthy was defendant, in the same court, Wil-
56 liam Franklin alleged that he did the work upon said Tin Bar No. 1 mining claim for the years 1889, 1890, and 1891 to the extent of $100.00.

It is further in evidence that the location certificate of the Tin Bar No. 1 was of record in Pennington county, and that at the time said Patrick B. McCarthy bought his interest in said Tin Bar No. 1 claim that he examined the records of the county in order to see whether or not it was properly recorded, and relied upon said record.

(3.) The court erred in making the first conclusion of law.
(4.) The court erred in making the second conclusion of law.
(5.) The court erred in making the third conclusion of law.
(6.) The court erred in making the fourth conclusion of law.
(7.) The decision of the court was against law.
(8.) The court erred in entering judgment in favor of the defendants and against the plaintiff.

This motion will be based upon the bill of exceptions which has already been settled in this case, and upon all the papers and proceedings in the above-entitled action.

CHARLES W. BROWN AND
McLAUGHLIN & McLAUGHLIN,
Attorneys for the Plaintiff.

To James W. Fowler and Temple & Gardner, attorneys for defendants.

57 In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota in and for the County of Pennington.

PATRICK B. McCARTHY, Plaintiff,
vs.
EDWARD W. SPEED, as Administrator of the Estate of William B. Franklin, Deceased; Jennie E. Franklin and Cora C. Stone, as Heirs-at-law of said William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, Defendants.

Order Overruling Motion for a New Trial.

Now, on this day, pursuant to notice duly served, coming on regularly to be heard the motion of the plaintiff for a new trial of this action, Charles W. Brown, Esq., and Messrs. McLaughlin & McLaughlin appearing in support of said motion, and James W. Fowler, Esq., and W. O. Temple, Esq., appearing in opposition thereto, and the court having heard the arguments of counsel and being fully advised in the premises—

It is considered and ordered that the said motion be, and the same hereby is, overruled and denied.

Done in said county this 30th day of September, 1896.

By the court:

WILLIAM GARDNER, *Judge.*

To which order and ruling the plaintiff at the time duly excepted, and at his request this exception is signed and allowed.

WILLIAM GARDNER, *Judge.*

58 In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for Pennington County.

PATRICK B. McCARTHY, Plaintiff,
vs.
EDWARD W. SPEED, as Administrator of the Estate of William Franklin, Deceased; Jennie E. Franklin and Cora C. Stone, as Heirs-at-law of said William Franklin, Deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, Defendants.

Notice of Appeal.

Take notice that the plaintiff, Patrick B. McCarthy, hereby appeals to the supreme court of the State of South Dakota from the judgment of said circuit — rendered and entered herein on the 27th day of February, 1896, in favor of the defendants and against the plaintiff, ordering, adjudging, and decreeing the dismissal of the plaintiff's complaint herein upon its merits and the recovery from the plaintiff by the defendants of the sum of $80.85 for their costs and disbursements of this action and other relief in said judgment specified, and from the order of said circuit court made and entered herein on the 30th day of September, 1896, overruling and denying

the motion of the plaintiff for a new trial of this action and from the whole and every part of said judgment.

And, further, take notice that upon the said appeal the said plaintiff and appellant will insist upon a review and reversal by said supreme court of the whole and every part of the said judgment and order and of the decision upon which the said judgment was rendered and entered.

Dated at Rapid City, South Dakota, this 3rd day of October, A. D. 1896.

CHARLES W. BROWN AND
McLAUGHLIN & McLAUGHLIN,
Attorneys for Plaintiff and Appellant.

To James W. Fowler, Esq., and Messrs. Temple & Gardner, attorneys for said defendants, and to Frank P. Cory, clerk of said circuit court.

59 In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota in and for Pennington County.

PATRICK B. McCARTHY, Plaintiff and Appellants, *versus* EDWARD W. SPEED, as Administrator of the Estate of William B. Franklin, Deceased; Jennie E. Franklin and Cora C. Stone, as Heirs-at-law of said William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, Defendants and Respondents.	Undertaking on Appeal.

Whereas, on the 27th day of February, 1896, in the said circuit court within and for the said county of Pennington, the above-named defendants and respondents recovered a judgment against the above-named plaintiff and appellant ordering, adjudging, and decreeing the dismissal of the plaintiff's complaint herein upon its merits and the recovery from the plaintiff by the defendants of the sum of $80.85 for their costs and disbursements of this action and other relief in said judgment specified; and whereas the said circuit court, on the 30th day of September, 1896, made and entered an order overruling and denying the motion of the plaintiff for a new trial of said action; and

Whereas the above-named plaintiff and appellant, feeling aggrieved thereby, intends to appeal from the whole and every part of said judgment and order to the supreme court of the State of South Dakota:

Now, therefore, we do hereby undertake, promise, and agree that the said plaintiff and appellant will pay all costs and damages which may be awarded against him on the said appeal or on a dismissal thereof not exceeding the sum of two hundred and fifty dollars.

Dated at Rapid City, South Dakota, this 3rd day of October, 1896.

PATRICK B. McCARTHY. [SEAL.]
ZACHARIAH HOLMES. [SEAL.]
ABRAM C. BOLAND. [SEAL.]

60 STATE OF SOUTH DAKOTA, } ss:
County of Pennington, }

On this 3rd day of October, A. D. 1896, before me, Charles W. Brown, a notary public within and for said county and State, personally appeared Zachariah Holmes, Patrick B. McCarthy, and Abram C. Boland, known to me to be the persons who are described in and who executed the foregoing and within undertaking, and severally duly acknowledged to me that they executed the same.

[SEAL.] CHARLES W. BROWN,
Notary Public.

STATE OF SOUTH DAKOTA, } ss:
County of Pennington, }

Zachariah Holmes and Abram C. Boland, being severally duly sworn, each for himself and not one for the other, upon his oath says: The said Zachariah Holmes, for himself, says that he is a resident and freeholder within said State; that he is worth the sum of five hundred dollars over and above all his debts and liabilities in property within this State not by law exempt from execution; and the said Abram C. Boland, for himself, says that he is a resident and freeholder within said State, and that he is worth the sum of five hundred dollars over and above all his debts and liabilities in property within this State not by law exempt from execution; and the said affiants further say that they are the sureties named in and who executed the foregoing undertaking, and that the said Zachariah Holmes resides in the city of Rapid City, in said State, and that the said Abram C. Boland resides near the said city of Rapid City, in said county of Pennington, to wit, about one-half mile from said city of Rapid City.

ZACHARIAH HOLMES.
ABRAM C. BOLAND.

Subscribed and sworn to before me this 3rd day of October, A. D. 1896.

[NOTARIAL SEAL.] CHARLES W. BROWN,
Notary Public.

61 "H"-r-975.

In the Supreme Court, State of South Dakota.

PATRICK B. McCARTHY, Appellant,
vs.
EDWARD W. SPEED, as Administrator of the Estate of William B. Franklin, Deceased; Jennie E. Franklin and Cora C. Stone, as Heirs-at-law of said William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, Respondents.

Opinion. Filed December 21, 1898.

Appeal from circuit court, Pennington county.

Charles W. Brown and McLaughlin & McLaughlin, for appellant.

James W. Fowler, Loomis S. Cull, and Fred H. Whitfield, for respondents, except Fayel.

W. O. Temple and A. K. Gardner, for respondent John J. Fayel.

HANEY, *J.*:

This action, brought for the purpose of determining adverse claims to certain mining property, was tried by the court and resulted in a judgment wherein the claims of plaintiff are adjudged invalid. He appeals from such judgment and from an order denying a new trial.

From the findings of the trial court the following facts appear: On September 16, 1882, Jacob F. Reed and William Franklin located a portion of the ground in controversy as the Reed
62 placer mining claim. From the date of location until 1892 Reed and Franklin were in actual, notorious, and peaceable possession of the claim, were acknowledged and reputed to be the owners, and during each year performed the required development work. They applied for patent November 23, 1892. Final entry was made March 13, 1893. There was no application for a lode on the placer site aside from the placer claim. The boundaries of the claim as patented coincide with its boundaries as staked upon the ground at the time of location. January 25, 1888, Reed, Franklin, Thomas C. Blair, and Frank Eaton marked the boundaries of Tin Bar No. 1 claim upon the ground with stakes, as required by law, posted a discovery or location notice thereon, and within sixty days thereafter recorded a location certificate, but did no other act of location at that time. The location or discovery notice of this claim was posted inside the boundaries of the Reed placer claim, and the point claimed as discovery on the Tin Bar No. 1 is the same point at which the notice was posted. No labor has been performed or improvements made upon the claim, except about 4 days' work in 1889 and about 4 days' work in 1891, such work not exceeding $14 in each of those years. There was no agreement on the part of defendants Blair and Franklin with plaintiff to perform labor or make

improvements on Tin Bar No. 1 in 1893 or 1894, and no contractual relation existed between them in regard to such claim when the Holy Terror claim was located. January 25, 1888, Blair and Eaton did the same acts of location with respect to Tin Bar No. 2 that were done in respect to Tin Bar No. 1. No labor has been performed or improvement made upon Tin Bar No. 2, except about 4 days' work in 1891, of value not exceeding $14. There was no agreement on the part of the defendants Franklin or Blair with plaintiff to perform labor or make improvements upon Tin Bar No. 2 in 1892, 1893, or 1894, and there was no contractual relation existing between them in regard to such claim during those years. Defendant Franklin located the lode claims Holy Terror and Keystone No. 4 on June 28, 1894, and September 20, 1894, respect-
63 ively, and the law has been complied with so far as it relates to those claims since the date of each. Defendants are the owners of the Holy Terror and Keystone No. 4, save for the rights of the plaintiff in this action. No adverse was filed by plaintiff or other owners of either Tin Bar No. 1 or 2 to the application for patent to the Reed placer claim. At and prior to the time of the application for patent to the placer claim there was no known lode or vein therein within the boundaries of either Tin Bar claim of such character as to render the ground more valuable because of its presence or to justify the expenditure of money for either exploitation or development. There was no application for patent to any lode or vein included in the placer claim in the application for patent to the placer claim. The Holy Terror embraces 1.62 acres of the ground covered by the Tin Bar No. 1 and Keystone No. 4 embraces 2.71 acres of the ground covered by Tin Bar No. 2. In 1888 Eaton conveyed an undivided one-fourth interest in Tin Bar No. 1 and Tin Bar No. 2 to George Williams, who in the same year conveyed the same interest to plaintiff and one Michael McGuire. On April 22, 1890, Eaton conveyed an undivided one-fourth interest in Tin Bar No. 2 to defendant Franklin, and Blair conveyed a like interest therein to Jacob F. Reed. When this action was commenced Franklin, since deceased, and defendants Blair, Fayel, and Amsbury each owned an undivided one-fourth interest in the Holy Terror claim and an undivided seven-thirty-sixths interest in Keystone No. 4. Blair acquired his interest in the Holy Terror Lode claim with full knowledge of whatever rights the plaintiff had, if any. During 1891 Blair and Franklin discovered a well-defined ledge of mineral-bearing rock in place, carrying gold, upon Tin Bar No. 2, the point of discovery being outside the limits of Reed placer claim. The location notice on Tin Bar No. 1 was posted upon a well-defined ledge of rock carrying tin, but plaintiff and defendants had no knowledge of the existence of tin or other valuable deposit therein until the
64 trial of this action in the court below. There is no proof that the plaintiff is, ever was, or ever declared his intention of becoming a citizen of the United States.

It will be assumed that the evidence sustains the findings of fact. Do they support the judgment? Defendants cannot question plain-

tiff's citizenship in this action. Manuel *v.* Wulff, 152 U. S., 505; 14 Sup. Ct. Rep., 651.

It is the theory of plaintiff that he owned an interest in each of the Tin Bar claims upon which the annual assessment-work was not done; that a portion of the ground covered by each was relocated by his cotenant as the Holy Terror and Keystone No. 4; that such relocations were valid, but that the relocators should be adjudged to be his trustees to the extent of his interest in the Tin Bar claims. This theory necessarily involves the validity of the Tin Bar locations. It is contended by defendants that neither claim ever existed for the reason that there was no actual discovery within its limits; that the Tin Bar No. 1 discovery notice was posted within the boundaries of the then subsisting unpatented placer claim, and that if the Tin Bar location was originally valid, the claim ceased to exist when the placer claim was patented.

It seems to be well settled that a stranger cannot locate a lode claim within the limits of another subsisting unpatented lode claim, but our attention has not been called to any decision which applies this rule to unpatented placer claims. In Mr. Lindley's recent work this language is found: "The policy of the gover-ment with reference to lodes is to sever them from the body of the public lands and to deal with them and the land immediately inclosing them as separate and distinct entities. The location of mining ground for placer purposes does not effect such severance. The placer claimant may, in the absence of a discovery and location by others, obtain the title to the lode, but he has not such right by virtue of his prior placer appropriation. This right to appropriate the lode must flow from the discovery of the lode. Whosoever first discovers the lode may appropriate it by complying with the
65 laws confer-ing privileges upon such discoveries. If he fails to do so, it is open to the next comer, and this rule applies to the placer claimant as well as to strangers. If, having discovered it, he fails to manifest his intention to claim it by appropriating it under the lode laws, it may be the subject of appropriation by others the same as if it were upon the public domain, provided always that such appropriation is made and perfected peaceably and in good faith." 1 Lindley on Mines, sec. 413. However this may be with respect to strangers, there is certainly no reason for holding that the owner of an unpatented placer claim cannot locate a lode claim or consent to such a location being made by others within the boundaries of his placer claim. Under such circumstances it would hardly be logical to regard the placer owner as a trespasser upon his own premises, and, as we shall attempt to show hereafter, the defendants are estopped from questioning the validity of the Tin Bar claims to the injury of the plaintiff. We think the learned circuit court erred in concluding that the Tin Bar No. 1 claim was invalid in its inception because its point of discovery was within the boundaries of the placer claim.

If the Tin Bar claims were located when application for patent to the placer was made, they were not affected thereby, no application for lodes having been included in the application for the placer

patent. Noyes *vs.* Mantle, 127 U. S., 348; Iron S. M. Co. *vs.* Mike & Starr G. & S. M. Co., 12 Sup. Ct. Rep., 543.

As to what constitutes a discovery within the meaning of the Federal statutes has caused the courts no little trouble. It might be difficult to determine in this case from the findings of the trial court whether any discovery was ever made upon either Tin Bar claim, but are these defendants in position to allege or prove as against the plaintiff that the declarations contained in the recorded location certificates were false, and that no discoveries were in fact ever made? We think not. Can the locators of these claims
66 be heard to contradict their own recorded representations to the injury of this plaintiff?

It is disclosed by the evidence that plaintiff purchased his interest in the Tin Bar claims for a valuable consideration after an examination of the records, relying upon the location certificates which were placed upon the public records by the locators for the purpose of selling the property as mining claims. Where one of his conduct intentionally causes another to believe in the existence of a certain state of facts and induces him to act on that belief, the former is estopped from averring against the latter the existence of a different state of facts at the same time. The locators of these claims, with actual knowledge of the facts, caused location certificates to be recorded, thereby representing that discoveries had been made on each, with the expectation and intention of inducing persons who might examine the records to believe that they were the owners of properly located mining claims. This conduct produced intended results. They sold an interest in the claims, plaintiff examined the records, was induced to believe that the claims had been legally located, and acted on such belief. Whatever rights he has in this action depend upon the facts which the conduct of the locators induced him to believe existed when his interest in the claims was acquired. It would be a travesty on justice to permit the locators to now impair such rights by asserting that their recorded representations were false. Neither of the defendants is in any better position that the original locators, and all are estopped from denying the validity of the Tin Bar locations.

It being determined that for the purpose of this action the Tin Bar claims were valid in their inception, the main controversy is whether, when the annual assessment-work has not been done upon a mining claim, one cotenant therein can relocate the same and obtain title thereto, not only as against the world, but as against his cotenants. We are not aware that the precise question
67 here presented has ever been decided by any court of last resort. It is well settled that cotenants stand in a certain relation to each other of mutual trust and confidence; that neither will be permitted to act in hostility to the other in reference to the joint estate, and that a distinct title acquired by one will inure to the benefit of all. This principle arises from the privity subsisting betwe-n parties having a common possession of the same land and a common interest in the safety of the possession of each, and it only inculcates that good faith which seems appropriate to their

relative position. Venable *vs.* Beauchamp, 3 Dana, 321. It has been applied to mining property by the Federal Supreme Court. In a case in that court where one had acquired an interest in an unpatented claim, by purchase at sheriff's sale, and obtained a patent to the entire property to the exclusion of another, who was found to own an interest therein, it was decided that the patentee held the title in trust for his cotenant, and that a court — equity would inforce the trust, and that the excluded cotenant was not required to adverse the application for patent. Turner *vs.* Sawyer, 150 U. S., 578; 14 Sup. Ct. Rep., 192. Therefore the only question to be determined in this connection is whether the relation of cotenant existed between plaintiff and Franklin when the latter located the Holy Terror and Keystone claims. "A mining claim perfected under the law is property in the highest sense of that term which may be bought, sold, and conveyed and will pass by descent." Belk *vs.* Meagher, 104 U. S., 279. Actual possession of the claim is not essential to the validity of the title obtained by a valid location, and until such location is terminated by abandonment or forfeiture no right or claim to the property can be acquired by an adverse entry thereon with a view to the location thereof. Belk *vs.* Meagher, *supra*. Abandonment is always a question of intention. In forfeiture the element of intention is not involved. It rests entirely upon the statute and involves only the question whether
68 the terms of the law have been complied with. Lapse of time, absence from the ground, or failure to work a claim for any definite period unaccompanied by other circumstances are not evidence of abandonment. Original locators may resume work at any time before relocation. Forfeiture is not complete until some one else has appropriated the property. 2 Lindley on Mines, 644; U. S. Rev. Sts., 2324. Plaintiff and Franklin continued to be cotenants so long as the Tin Bar claims continued to exist; they continued to exist until the ground was relocated and during every instance of that time the latter was in law incapable of performing any act in hostility to his cotenant in reference to the joint estate. Franklin was plaintiff's cotenant at the time he entered the boundaries of either Tin Bar claim for the purpose of relocating the ground. His entry for that purpose was host-le to his cotenant unless he intended to relocate for the benefit of all the owners of the Tin Bar claims. It may be that he owed no duty to his cotenants to represent the claims; it may be that he was at liberty to refrain from performing any act in reference thereto; but if he elected to act at all he was bound to act for the benefit of all the owners. His acts of relocation did not terminate the fiduciary relation between himself and plaintiff, because they were, if done for the purpose of defeating the rights of his cotenants, in hostility to his interests, and if they were not done for that purpose they, of course, operated to the benefit of all the owners. We think the circuit court should have adjudged the defendants to be trustees and have enforced the trusts. This conclusion is not precluded by the language of the Federal statutes. They provide that, upon a failure to comply with required conditions as to labor or improvements,

"the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made." U. S. Rev. Sts., 2324. It is contended that if Congress intended to have the relocator regarded as a trustee under any circumstances such intention would have been expressed in the statute. The contention is not tenable. The trust
69 results from the fiduciary relation of the parties and not from the operation of the statute. If such relations exists between an original locator and another and he secures a patent no one will deny that he may be adjudged to hold the property in trust for such person, or if a relocator sustains such relation to a third person the latter rights may be enforced in equity. If this be true there is no reason for making a different rule as to cotenants. The relocator is permitted by the statute to acquire the property in the same manner that the original locator would have acquired it, but because of his relation to another, who may be a cotenant, a mortgagee, or person having no estate in the property, he will be adjudged to hold the title in trust for such person. In all cases of this character the trust depends upon the relation of the parties, not upon the manner in which title is acquired.

It is contended that the rule herein announced is contrary to public policy and will result in endless embarassment and confusion to a claim of rights already sufficiently uncertain. We reply that a sound public policy always requires honesty and fair dealing. The Federal statutes provide a most arbitrary and summary manner, commonly called "advertising out," in which one owner of a mining claim may compel his co-owners to contribute their share of assessment-work or cease to have any interest in the claim. An adequate method is thus provided for enforcing the rights of co-owners in respect to the development of mining property, one that should satisfy the demands of all persons who desire to act fairly with their business associates.

It is urged in argument of counsel for appellant that the judgment below should be reversed and cause remanded with directions to enter judgment for plaintiff. This we think should not be done. All the facts upon which we predicate an estoppel are not contained in the finding of fact; this court cannot supply such facts, and without them the decision of the trial court would not sustain a judgment in favor of the plaintiff. The judgment and order de-
70 nying a new trial are reversed and a new trial ordered.

STATE OF SOUTH DAKOTA, *ss*:

In Supreme Court.

PATRICK B. McCARTHY, Plaintiff and Appellant,
vs.
EDWARD W. SPEED, Defendant and Respondent.

I, Jessie Fuller, clerk of the supreme court in and for the State of South Dakota, do hereby certify that the foregoing pages numbered from one to eleven, inclusive, contain a true and correct copy of the

opinion filed December 21, 1898, in the above-entitled cause and of the whole thereof, as the same now remains of record in said supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Pierre, this 5th day of October, A. D. 1899.

JESSIE FULLER,
[SEAL.] *Clerk of the Supreme Court.*

71 "H"-r-975.

In the Supreme Court, State of South Dakota.

PATRICK B. MCCARTHY, Appellant,
vs.
EDWARD W. SPEED, as Administrator of the Estate of William B. Franklin, Deceased; Jennie E. Franklin and Cora C. Stone, as Heirs-at-law of said William B. Franklin, Deceased; Thomas C. Blair, Albert Amsbury, and John J. Fayel, Respondents.

Opinion. Filed September 2, 1899.

Appeal from Pennington county circuit court.

Charles W. Brown and McLaughlin & McLaughlin, for appellant.

Schrader & Lewis and Fowler, Cull & Whitfield, for respondents.

HANEY, *J.:*

The issue involved in this action are stated in our former decision, S. D., 77 N. W., 590. Upon the argument on rehearing respondents moved to dismiss for the following reasons: 1. Because the order denying an order for a new trial was not entered *with* the appeal was taken; and 2, because since the appeal was taken all the ground in controversy has been conveyed by defendants to a corporation to which a patent has issued by the United States Government. It has been frequently held by this court that where the appeal is from the judgment, and an order made after judgment, and the order has never been entered, the case will be considered as an appeal from the judgment alone. McCormack Harv. Mach. Co. *vs.* Woulph, S. D., 76 N. W., 939. The motion to dismiss for the reason must be denied and the record reviewed as if no mo-
72 tion had been made. It must also be denied on the second ground. It is alleged that a notice of the pendency of the action was filed in the proper county; if so, the defendants' transferee acquired title with constructive notice of the plaintiff's interest in the property. Comp. Laws, 4897. Plaintiff is not seeking to prevent the defendants or their grantee from acquiring title under locations conceded to be valid, but it is seeking to establish his rights to an interest in the property by virtue of the location under which defendants claim title. If defendant's successor has obtained a patent with notice of plaintiff's rights, a court of equity can decree that plaintiff, as cotenant of the original locators, has an interest in

the property, and that the patentee holds the title in trust for the excluded cotenant. Plaintiff was not required to adverse the application for patent. Turner *v.* Sawyer, 150 U. S., 578; 14 Supt. Ct., 192; Suessenbach *v.* Bank, 5 Dak., 477; 41 N. W., 662.

Since the rehearing the questions presented by the merits of the appeal have received careful attention. The views announced by our former opinion are adhered to with slight modifications rendered necessary by the fact, since disclosed, that the order granting a new trial was not entered, and that the evidence is not properly before us. It is stated in our former decision "that the evidence disclosed that the plaintiff purchased his interest in the Tin Bar claims for a valuable consideration after an examination of the records, relying upon the location certificates which were placed upon the public records by the locators for the purpose of selling the property as mining claims." And this: "It is urged in argument of counsel for appellant that the judgment below should be reversed and the cause remanded with directions to enter judgment for plaintiff." This we think should not be done. All the facts — which we predicate an estoppel are not contained in the findings of
73 fact. This court cannot supply such facts, and without them the decision of the trial court would not sustain a judgment in favor of the plaintiff. The judgment and order denying a new trial are reversed, and new trial ordered." It now appears we cannot consider the evidence and must base our decision upon the facts found by the court below. Its findings show that Reed, Franklin, Blair, and Eaton recorded a location certificate for Tin Bar No. 1, and that Blair and Eaton recorded a location certificate for Tin Bar No. 2 in the office of the register of deeds in the proper county before plaintiff purchased his interest in said claims; that neither defendant is in any better position than the original locators. And whether or not the plaintiff examined and relied upon the records, we think defendants are estopped from denying the validity of these locations. It follows that plaintiff is entitled to a judgment in his favor upon the facts as found by the trial court. Its judgment is therefore reversed and the cause remanded with directions to enter judgment, and adjudging the plaintiff to be the owner of a one-eighth interest in and to so much of the ground covered by the Holy Terror claim and the Keystone No. 4 claim as is embraced within the boundaries of the Tin Bar No. 1 and Tin Bar No. 2, as shown by the circuit court's findings of fact, and for his costs and disbursements in the court below.

STATE OF SOUTH DAKOTA, *ss:*

In Supreme Court.

PATRICK B. McCARTHY, Plaintiff and Appellant,
vs.
EDWARD W. SPEED ET AL., Defendants and Respondents.

I, Jessie Fuller, clerk of the supreme court in and for the State of South Dakota, do hereby certify that the foregoing pages numbered

from 1 to 4, inclusive, contain a true and correct copy of the opinion filed Sept. 2, '99, in the above-entitled cause, and of the whole thereof, as the same now remains of record in said supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Pierre, this 5th day of October, A. D. 1899.

JESSIE FULLER,
Clerk of the Supreme Court.

[SEAL.]

74 In the Supreme Court, State of South Dakota.

Be it remembered that at a term of the supreme court of the State of South Dakota, begun and held at Pierre, State of South Dakota, on the first Tuesday of April, A. D. 1899, on the 54th day of the term, to wit, on the 2nd day of September, A. D. 1899—present, Dighton Corson, presiding judge, and Howard G. Fuller and Dick Haney, judges of said court—the following proceedings were had and the following judgment was entered, to wit:

File No., 975.

In the Supreme Court, State of South Dakota, April Term, A. D. 1899.

Present: Dighton Corson, presiding judge; Howard G. Fuller and Dick Haney, judges of said court, and the officers thereof.

PATRICK B. MCCARTHY, Plaintiff and Appellant,
vs.
EDWARD W. SPEED, as Administrator; JENNIE E. FRANKLIN *et al*, Defendants and Respondents.

This action coming on to be heard at the April, A. D. 1899, term of this court, at the supreme court room, in the city of Pierre, State of South Dakota, upon the merits of the appeal and respondents' motion to dismiss, the same being argued orally by C. L. Lewis and James W. Fowler for respondents, and Charles W. Brown and W. L. McLaughlin for appellants, and the court having advised thereon and filed its decision in writing—

It is considered, ordered, and adjudged that the judgment of the circuit court within and for Pennington county appealed from herein be, and the same is hereby, reversed; that respondents'
75 motion be denied and the cause remanded with directions to enter judgment as directed in the aforesaid decision.

And it is further ordered that this action be, and it is hereby, remanded to said circuit court for further proceedings according to law and the decision of this court.

And it is further ordered and adjudged that appellant have and recover of the respondents costs and disbursements on this appeal expended, taxed, and allowed at three hundred sixty and $\frac{15}{100}$ dollars.

By the court:

D. CORSON,
Presiding Judge.

Attest: JESSIE FULLER, *Clerk.*

[SEAL.]

STATE OF SOUTH DAKOTA, } ss:
County of Hughes, }

I, Jessie Fuller, clerk of the supreme court within and for the State of South Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of judgment and order of the supreme court of the State of South Dakota in the above-entitled action, wherein Patrick B. McCarthy is plaintiff and appellant *versus* Edward W. Speed *et al.*, defendants and respondents, as the same now remains of record in said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 5th day of October, A. D. 1899.

[SEAL.] JESSIE FULLER, *Clerk.*

76 Costs and disbursements taxed and allowed as follows:

Costs.

Before argument	$5.00
Before argument on rehearing	5.00
For argument	15.00
For argument on rehearing	15.00
Making and serving case necessarily containing more than 50 folios	7.00

Disbursements.

Clerk's fees to perfect appeal record	2.00
Stenographer's fees to perfect appeal record	76.80
Printing brief, 31 pages	31.00
Printing brief on rehearing	12.75
Printing abstract, 123 pages, at $1.00, and map, $20.00	143.00
Printing supplemental brief, 10 pages	10.00
Fees clerk supreme court	31.05
Fees clerk supreme court on rehearing	5.05
Expressage and postage	1.50
Total	$360.15

(Endorsed upon the back as follows:)

(File No., 975.) In supreme court, State of South Dakota, April term, 1899. Patrick B. McCarthy, plaintiff and app'l't, *vs.* Edward W. Speed, as administrator, *et al.*, defendants and resp'd'ts. Filed in open court this 2d day of September, 1899. Jessie Fuller, clerk. Remittitur. Filed Oct. 9, 1899. John P. McElroy, Jr., clerk of courts. Book 9, page 104 & 105.

77 "EXHIBIT A."

In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota within and for the County of Pennington.

PATRICK B. McCARTHY, Plaintiff,
vs.
EDWARD W. SPEED, as Administrator of the Estate of William B. Franklin, Deceased; Cora C. Stone, as Heir-at-law of said William B. Franklin, Deceased; Georgia B. Bierman, as Sole Devisee and Heir-at-law of Jennie E. Franklin, Deceased; Alvah F. Fay, as Executor of the Last Will of said Jennie E. Franklin, Deceased; Thomas C. Blair, Albert Amsbury; John S. George, George E. Yost, and Philip M. Ranney, as Executors of the Last Will and Testament of John J. Fayel, Deceased; Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, Her Guardian, as Heirs-at-law and Successors in Interest of said John J. Fayel, Deceased, Defendants. } Judgment.

This action having come on for trial before the court on the 17th day of January, 1896, and the court having thereafter, on February 15, 1896, filed its decision in writing herein, and having thereafter, on February 27, 1896, entered judgment in said action in favor of the defendants and against the plaintiff upon all the issues, and the plaintiff having thereafter, within the time allowed by law, to wit, on the 6th day of October, 1896, duly appealed to the supreme court of the State of South Dakota from the said judgment and from the order heretofore made herein overruling the plaintiff's motion for a new trial of this action, and the supreme court of the State of South Dakota having thereafter, on September 2, 1899, duly entered a judgment on said appeal reversing the said judgment of the circuit court and remanding the cause to the court below, with directions to the circuit court to enter judgment in favor of the plaintiff and against the defendants for a part of the relief prayed by the plaintiff, together with the costs and disbursements of
78 this action, and the defendant Jennie E. Franklin having departed this life on or about the first day of December, A. D. 1898, and the said Georgia B. Bierman, as sole devisee and heir-at-law of said Jennie E. Franklin, deceased, and the said Alvah F. Fay, as sole executor of the last will of said deceased, having been duly substituted as defendants herein in the place and stead of the said Jennie E. Franklin, deceased; and it having been suggested to the court that on the 21st day of October, 1898, the said defendant, John J. Fayel, departed this life, and that his representatives and successors in interest are John S. George, George E. Yost, and Philip M. Ranney, the duly appointed, qualified, and acting executors of the last will and testament of said John J.

Fayel, deceased, and Alma Lambert Fayel and Theresa Helen Fayel, by Alma Lambert Fayel, her guardian, sole heirs-at-law of said John J. Fayel, deceased; and the said representatives and successors in interest of said John J. Fayel, deceased, having heretofore been duly substituted as defendants herein in his place and stead, and the plaintiff having duly served a notice of motion in this court to enter judgment herein in favor of the plaintiff and against the defendants above named and each of them, in accordance with the mandate of the supreme court, Mr. Charles W. Brown appearing in support of said motion and Mr. James W. Fowler appearing for said defendants in opposition thereto, and the court being fully advised in the premises:

Now, therefore, on motion of Charles W. Brown and McLaughlin & McLaughlin, plaintiff's attorneys, it is considered, ordered, adjudged, and decreed that the plaintiff, Patrick B. McCarthy, is now and has been since the 28th day of June, 1894, the owner and entitled to the possession, as against the said defendants and each and all of them, of an undivided one-eighth ($\frac{1}{8}$) interest in and to the following-described portion of that certain mine and tract of land situate in Cross mining district, in said county of Pennington and State of South Dakota, and known as the Holy Terror Lode
79 claim, the location certificate of which was recorded on the 19th day of July, 1894, in the office of the register of deeds of said county, in Book 21 of Location Certificates, at page 22, to wit: Commencing at the southeast corner of said Holy Terror Lode claim, which corner is situate on the northerly line of the Reed placer claim, hereinafter mentioned, and running thence north 62° 12′ west 394.6 feet; thence south 28° west seven feet; thence south 41° 5′ west 102.1 feet; thence south 47° 57′ east 480 feet to the southwest corner of said Holy Terror Lode claim; thence north 15° 30′ east 22.7 feet to the place of beginning, containing an area of one and $\frac{62}{100}$ (1.62) acres, said Holy Terror Lode claim being bounded on the west by the Keystone No. 4 Lode claim and on the south by said Reed placer claim, a patented claim known as M. C. No. 903.

It is further considered, ordered, adjudged, and decreed that the plaintiff, Patrick B. McCarthy, is now and has been since the 13th day of March, 1892, the owner and entitled to the possession, as against the said defendants and each and all of them, of an undivided one-eighth ($\frac{1}{8}$) interest in and to the following-described portion of that certain mine and tract of land, situate in Cross mining district, in said county of Pennington and State of South Dakota, and known as the Keystone No. 4 Lode claim, the location certificate of which was recorded on the 5th day of May, 1892, in the office of the register of deeds of said county, in Book 17 of Location Certificates, on page 639, to wit: Commencing at the southeast corner of said Keystone No. 4 Lode claim, which corner is situate on the northerly line of said Reed placer claim, and running thence north 47° 57′ west 480 feet; thence south 38° 6′ west 119 feet; thence south 39° 36′ west 92 feet; thence south 41° 50′ east 135.1 feet; thence south 47° 57′ east 446.3 feet to the southwest corner of said Keystone No. 4 Lode claim; thence north 15° 30′ east 252.6 feet to the place of

beginning, containing an area of two and $\frac{71}{100}$ (2.71) acres, said Keystone No. 4 Lode claim being bounded on the east by
80 the Holy Terror Lode claim and on the south by said Reed placer claim.

It is further considered, adjudged, and decreed that the said defendants or either of them have no estate, right, title, or interest whatsoever in or to the said undivided one-eighth interest and estate of and in the above-described premises, and that the said title of the plaintiff is as against said defendants and each and all of them good and valid.

It is further considered, ordered, and decreed that the said defendants and each and all of them, their agents, servants, employees, and attorneys, be, and they hereby are, forever enjoined and debarred from asserting any estate, right, title, claim, or interest whatsoever in or to the plaintiff's said undivided one-eighth interest and estate in said above described premises adverse to the plaintiff.

And it is further considered and adjudged that the plaintiff, Patrick B. McCarthy, recover of the said defendants his costs and disbursements incurred upon the trial of this action in the circuit court, heretofore taxed and adjusted by the clerk of this court at the sum of $98.20, and his costs and disbursements incurred upon said appeal, heretofore taxed and allowed by the clerk of the supreme court at the sum of 360.15, amounting in the aggregate to four hundred fifty-eight dollars and thirty-five cents.

Done in open court, at Rapid City, in said circuit, this 13th day of January, A. D. 1900.

By the court:

LEVI McGEE, *Judge*.

Attest:

[SEAL.] JOHN P. McELROY, JR., *Clerk*.

In circuit court within and for Pennington county. Patrick B. McCarthy, plaintiff, *vs.* Edward W. Speed *et al.*, defendants. Judgment. Filed Jan. 13th, 1900. John P. McElroy, Jr., clerk of court. Charles W. Brown, McLaughlin & McLaughlin, attorneys for plaintiff. Book 9, pages 162 to 165.

[Endorsed:] Patrick B. McCarthy *vs.* Edward W. Speed, as administrator, etc. Judgment after appeal.

Endorsed on cover: File No., 17,689. South Dakota, Pennington county, circuit court. Term No., 230. Edward W. Speed, as administrator of William B. Franklin, deceased, *et al.*, plaintiffs in error, *vs* Patrick B. McCarthy. Filed March 26th, 1900.